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In The

Supreme Court of the United States

October Term, 1989

LEON KATZ, ROBERT A. WRIGHT, JOHN F. RAUHAUSER, JR., WILLIAM E. PFADT, On Their Own Behalf And On Behalf Of All Others Similarly Situated,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE PENNSYLVANIA DEFENSE INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The Pennsylvania Defense Institute (hereinafter "PDI") is a statewide, non-partisan, non-profit association of defense

[1] This brief is filed with the consent of all parties pursuant to Supreme Court Rule 36.1.

counsel and insurance industry executives. PDI is dedicated to research and education in the interest of the legal community and the general public. For many decades PDI has worked steadily and professionally toward maintaining the integrity of the legal profession and maintaining its relationship to the public, throughout the Commonwealth.

PDI is interested in maintaining the high quality of the Pennsylvania Judiciary and seeing that qualified, experienced judges remain on the bench as long as they are physically and mentally able. Article V, section 16(b) of the Constitution of the Commonwealth of Pennsylvania frustrates this goal.

DISCUSSION

I. ARTICLE V, SECTION 16(b) OF THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, REQUIRING MANDATORY RETIREMENT OF JUDGES WHEN THEY ATTAIN THE AGE OF SEVENTY, VIOLATES PETITIONERS' RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. The Deprivation Of Petitioners' Liberty Interest In Their Reputations Violates Due Process

It is axiomatic that the requirements of procedural due process apply to deprivations of those interests encompassed by the fourteenth amendment. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 568 (1972). "An essential principle of due process is that a deprivation of life,

liberty, or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Loudermill*, 470 U.S. at 542. (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)).

"'Liberty' and 'property'" are broad and majestic terms. They are among the "'[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . .'" *Roth*, 408 U.S. at 571 (quoting *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). The concept of liberty encompasses "more than freedom from servitude." *Smith v. Texas*, 233 U.S. 630, 636 (1914) (quoted in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 322 (1975) (*per curiam*) (Marshall, J., dissenting)). This Court has stated that the constitutional guarantee protects "a person's good name, reputation, honor or integrity." *Roth*, 408 U.S. at 573.

The constitutional dimension of society's interest in "preventing and redressing attacks upon reputation," *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), is highlighted and exemplified by the defamation cases. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964). In broad terms, those cases stand for the proposition that a state has a compelling interest in protecting the reputation of its public officials and figures. *See Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1978). Accordingly, speech that is made with actual malice, that is knowledge of falsity or reckless disregard for the truth, and that harms the reputation of a public official or figure is not

protected by the first amendment right of free speech. *See Curtis Publishing*, 388 U.S. at 155.

Importantly, this Court noted in *Board of Regents v. Roth*, that "[t]here might be cases in which a state refused to re-employ a person under such circumstances that interests in liberty would be implicated." 408 U.S. at 573. Although the state's refusal to re-employ Mr. Roth did not occur under liberty-implicating circumstances, the Court emphasized that one such circumstance would be the imposition on an individual of a "stigma or other disability" foreclosing his or her freedom "to take advantage of other employment opportunities." *Id.*

By granting the Petition for a Writ of Certiorari, this Court has the opportunity to review a case in which a state's mandatory retirement scheme implicates a right to liberty. *Cf. Roth*, 408 U.S. at 573. According to the Pennsylvania Supreme Court, bases for requiring mandatory retirement of judges are the elimination of "unpleasantness of removing aged and disabled judges on an individual selective basis" and "prevention of harm by few senile judges more than offsets loss of judges who retain full powers past normal age." *Gondelman v. Pennsylvania*, ___ Pa. ___, ___, n. 7, 554 A.2d 896, 901, n.7 (1989) (A-37) (quoting Judiciary Subcomm. of Preparatory Comm. for Pa. Constit. Convention, Reference Manual No. 5 at 203-04 (1968)). By failing to distinguish between those members of the bench who are, in fact, unable to continue in their duties and those who are, all judges who reach the age of seventy are effectively deemed unfit for employment. Accordingly, the reputation of every older judge is being harmed by the Commonwealth's retirement scheme. Because the judges are being deprived of a

liberty interest in their reputations, the retirement scheme violates the due process requirements of the fourteenth amendment.

B. The Deprivation of Petitioners' Property Interest In Their Office Violates Due Process

The property interests protected by the Constitution, like the liberty interests, are not limited to a "few rigid, technical forms." *Perry v. Sinderman*, 408 U.S. 593, 601 (1972). "A person's interest in continued Government employment, although not 'fundamental' as the law now stands, certainly ranks among the most important of his personal concerns that a Government action would be likely to affect." *Vance v. Bradley*, 440 U.S. 93, 113 (1979) (Marshall J., dissenting). This Court has stated that a property interest in employment is not created by the Constitution: it is created by and its dimensions are "defined by existing rules or understandings that stem from an independent source such as state law." *Loudermill*, 470 U.S. at 538 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *accord Bishop v. Wood*, 426 U.S. 341, 344 (1976) (property interest in employment created by ordinance, implied contract).

The relevant state law as to the employment of judges is contained in the Constitution of Pennsylvania, Article V, section 15, as follows:

> The regular term of office of justices and judges shall be ten years and the regular term of office for judges of the municipal court and traffic court in the City of Philadelphia and of justices of the peace shall be six years. The tenure of any

> justice or judge shall not be affected by changes in judicial districts or by reduction in the number of judges.

Pa.Const., Art. V, § 15 (a); *see also* 42 Pa. Const. Stat. Ann. § 3152(a) (1981). No court sitting in Pennsylvania has had occasion to consider whether the foregoing provision creates a property right. In *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977), however, the Supreme Court of Pennsylvania reviewed the property right issue with respect to an officeholder in the legislative branch.[2] Petitioner Sweeney

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[2] Article II, section 2 of the Constitution of Pennsylvania provides:

> Members of the General Assembly shall be chosen at the general election every second year. Their term of service shall begin on the first day of December next after their election. Whenever a vacancy shall occur in either House, the presiding Officer thereof shall issue a writ of election to file such vacancy for the remainder of the term.

Article II, section 11 is as follows:

> Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause, and shall have all other powers necessary for the Legislature of a free State. A member expelled for corruption shall not thereafter be eligible to either House, and punishment for contempt or disorderly behavior shall not bar an indictment for the same offense.

had been expelled by his peers from his seat in the Pennsylvania House of Representatives, and he challenged the propriety of his expulsion on due process grounds. In concluding that "it may be that the requirement of the two-thirds vote to expel by itself satisfies procedural due process," the court conceded that a legislator has a "circumscribed" private interest in his elected office. *Id.* at 524-25, 375 A.2d at 713.

Justice White, writing for the majority in *Loudermill*, declared that the "'root requirement'" of the due process clause is that "'an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). In cases in which the property interest is one in employment, the importance of a hearing cannot be overstated because of the "severity of depriving a person of the means of livelihood." *Id.* at 543. Moreover, the deprivation of employment works a particularly acute hardship on older persons.

> While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically draining, but emotionally and physically draining. Deprived of his status in the community and the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct result of enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement

> poses a direct threat to the health and life expectancy of the retired person.

Murgia, 427 U.S. at 323 (Marshall, J. dissenting).

A Pennsylvania state judge, like a legislator, is an elected officer. *See* Pa. Const. art. V, § § 13, 15. There is no reasonable basis on which to conclude that only legislators have a property interest, albeit circumscribed, in their elected offices. Because Pennsylvania's mandatory retirement scheme deprives petitioners of a property interest in their elective offices, without a hearing, it violates petitioners' right to due process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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